NO. 83-1658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES F. McMANUS,

Petitioner,

—against—

THE VILLAGE OF SOUTHAMPTON, NEW YORK, and THE TOWN OF SOUTHAMPTON, NEW YORK, DONALD FANNING and JAMES CHISM,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANK L. AMOROSO
Counsel for Respondent
Town of Southampton, New York
100 Garden City Plaza
Garden City, New York 11530
(516) 746-7500

Of Counsel:

DAVID P. FRANKS
RIVKIN, LEFF, SHERMAN & RADLER

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Summary of Argument

Respondent Town of Southampton, New York respectfully submits that this Court should not issue a writ of certiorari to the United States Court of Appeals for the Second Circuit. It is this respondent's position that the Court of Appeals properly affirmed the judgment of the United States District Court for the Eastern District of

New York dismissing petitioner's complaint against the Town and Village of Southampton (the municipal respondents) for his failure to state a 42 U.S.C. §1983 claim against them cognizable under *Monell* v. *Department of Social Services of City of New York*, 436 U.S. 658 (1978). The *Monell* decision is dispositive of this matter, and petitioner fails to offer any compelling reason for modification of that decision under the circumstances presented in his case. Further, absent a basis for the exercise of Federal jurisdiction over their persons, the municipal respondents were properly dismissed as parties in this case. Therefore, the Court of Appeals did not depart from the accepted and usual course of judicial proceedings, and its order does not call for an exercise of this Court's power of supervision.

ARGUMENT

POINT I

No claim was stated against respondent town

The order of the United States Court of Appeals for the Second Circuit correctly affirmed the District Court's dismissal of petitioner's false arrest complaint under the Civil Rights Act of 1871, 42 U.S.C. § 1983, against respondent municipality, the Town of Southampton, New York. The complaint gives no notice whatsoever of those elements necessary to state a cause against it under that statute, and, absent any other basis for the exercise of Federal jurisdiction over the municipal respondent, the trial court properly dismissed the complaint against it.

The complaint (Appendix E to Petition) contains a detailed factual statement in its first count alleging specific acts of the individual respondents, Donald Fanning and

James Chism, relating to a July 2, 1980 arrest, and a three-paragraph conclusion that summarily characterizes their acts as violations of § 1983 committed by them as individuals and as conspirators.

The second and third counts of the complaint are stated against the municipal respondents, the Town and Village of Southampton. They recite the failure and refusal of the municipal respondents to pay petitioner upon his filing notices of claim pursuant to N.Y. General Municipal Law § 50(e) (McKinney 1977), which requires such notice as a condition precedent to suit against municipalities. The second count alleges negligence in their refusal to honor his claim for certain physical and psychic injuries and out-of-pocket expenses. The third count alleges malicious prosecution in their refusal to honor his claim for malicious prosecution.

When afforded an opportunity to elucidate the pleading during argument of a dismissal motion by co-respondent Village of Southampton, petitioner represented that his complaint should be construed as setting forth causes of action for unconstitutional arrest, malicious prosecution and negligence in securing handcuffs. The trial court noted that petitioner advanced no theory of liability except the imputed liability of *respondeat superior* against the municipal respondents. The trial court therefore concluded that the complaint stated no cause of action under § 1983 against the municipal respondents. Appendix B to Petition, p. B-2.

In analyzing petitioner's compliance with Fed.R.Civ.P. 8(a)(2), the trial court correctly concluded that the pleading before it failed to give fair notice of any theory against which the municipal respondents would have to defend apart from *respondeat superior*. *Id.* Indeed, the petition before this Court at no point argues that the trial court erred in construing the fair import and intendment of

the complaint. In passing, the petitioner remarks that the dismissal mooted his requests for document production, but raises this point only in relation to his damages and not to any belated suggestion that such discovery was necessary to enable him to amend his complaint. Petition, p. 5.

The thrust of petitioner's argument, however, appears to be that he should not be required to plead negligent appointment or training of a municipal employee or officer in order to state a cause of action under § 1983. His argument, apparently addressed to the substantive requirements of pleading a § 1983 claim, is purely hypothetical because his complaint cannot be said to have put the municipal respondents on notice of this particular theory of liability. The complaint merely informs the municipal respondents that their liability is based on their status as employers, not on any acts or omissions of their own.

In addition to failing to meet the fair notice requirement of Rule 8(a)(2), the petitioner wholly fails to offer any persuasive reason to distinguish or modify the substantive pleading requirement governing § 1983 allegations against municipalities as set forth by this Court in *Monell* v. *Department of Social Services of City of New York*, 436 U.S. 658 (1978). In that decision, this Court stated unequivocally that

> a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent *official policy*, inflicts the injury that the government as an entity is responsible under § 1983.

436 U.S. at 694. (Emphasis supplied.)

Contrary to petitioner's argument, this rule has not been modified in subsequent cases. Petitioner cites only *Owen* v. *City of Independence, Missouri,* 445 U.S. 622 (1980), *reh. den.,* 446 U.S. 993 (1980), but the issue in *Owen* was governmental immunity, not the substantive § 1983 pleading requirement of official policy. Furthermore, in discussing the governmental immunity issue reserved in *Monell,* the majority opinion in *Owen* reiterated the above-quoted language from *Monell.* 445 U.S. at 658; *see, also,* 445 U.S. at 655, n. 39.

Petitioner's hypothesized liability theory of negligent hiring and training—posited at Petition, p. 5, but never raised below—fails to meet the *Monell* requirement. This negligence theory is subsumed under the status theory of *respondeat superior*: Employers may be held vicariously liable for the acts of employees not only because of their deep pocket but also because the imputing of liability to them may foster greater care in the selection and supervision of employees. *See* Prosser, Torts (4th ed.), § 4, p. 23; § 69, p. 459.

Accordingly, the complaint was properly dismissed for petitioner's failure to give fair notice that his injury resulted from any official policy of the municipal respondents.

POINT II

The lower courts, correctly citing controlling Supreme Court authority, declined to retain state law claims under the doctrine of pendent jurisdiction.

Petitioner also argues that the trial court abused its discretion in dismissing his pendent state law claim against the municipal respondents.

In the first place, as the Court of Appeals noted, Exhibit A to Petition, p. A-3, the lack of any basis for Fed-

eral jurisdiction over the persons of the municipal respondents mandated such dismissal. As this Court held in another § 1983 case, *Aldinger* v. *Howard,* 427 U.S. 1 (1976), there is no such thing as pendent party jurisdiction, only pendent claims jurisdiction.

In the second place, even were there a cognizable Federal claim stated against the municipal respondents in this non-diversity case, petitioner fails to offer a convincing argument why dismissal of the pendent state claim would be an abuse of the trial court's discretion. The trial court's allowing petitioner to proceed against individual respondent Donald Fanning in his dual capacity as an employee of both municipal respondents was irrelevant to the pendent jurisdiction issue: That ruling addressed the § 1983 requirement of showing color of state law in order to hold that individual respondent liable, not either of the municipal respondents.

Equally unpersuasive is petitioner's argument that he was deprived of a fair trial against the individual respondents because the absence of the municipal respondents "left the jury in the dark as to where indemnification might come from." Petition, p. 6. Petitioner would not deny the irrelevancy of the municipal respondents' financial resources to his right to damages. Therefore, he cannot be heard to complain that the trial court declined to hold them in as parties solely to permit speculation as to an unalleged duty on their part to indemnify the individual respondents.

Accordingly, the trial court did not abuse its discretion in dismissing the pendent state claim against the municipal respondents.

CONCLUSION

Inasmuch as the United States Court of Appeals' affirmance of the dismissal of the § 1983 complaint against the municipal respondent Town of Southampton was properly based upon recent decisions of this Court, the petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

FRANK L. AMOROSO
Counsel for Municipal Respondent
Town of Southampton, New York
100 Garden City Plaza
Garden City, New York 11530
(516) 746-7500

Of Counsel:

DAVID P. FRANKS
RIVKIN, LEFF, SHERMAN & RADLER